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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITIBANK, N.A.,

Plaintiff and Respondent,

v.

BOHDAN S. POLNY,

Defendant and Appellant.

G049719

(Super. Ct. No. 30-2013-00621609)

O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County,  
Kirk H. Nakamura, Judge. Affirmed.

Bohdan S. Polny, in pro. per., for Defendant and Appellant.

Hunt & Henriques, Michael S. Hunt, Janalie Henriques and Kurtiss A.  
Jacobs for Plaintiff and Respondent.

## INTRODUCTION

Appellant Bohdan Polny challenges the trial court's denial of a last-minute motion to amend his answer to assert 31 new affirmative defenses against respondent Citibank, N.A. The trial court found that Polny had waited too long to assert the affirmative defenses and that permitting him to amend on the day of trial would prejudice Citibank.

The trial court has wide discretion to grant or deny motions for leave to amend. The court did not abuse its discretion in this case, especially as it appeared that Polny copied his affirmative defenses out of a form book and lacked any factual basis for them. Any defenses that could have potentially applied to the case would indeed have required additional discovery. We therefore affirm the order denying the motion for leave to amend and the final judgment.

## FACTS<sup>1</sup>

Citibank lent Polny's chiropractic business \$125,000 in the form of a commercial credit account, which he had to pay back in monthly installments. Polny personally guaranteed the loan. He made a few payments, but he stopped paying when the balance reached \$109,000.

Citibank sued Polny personally on the debt in early January 2013. Representing himself, Polny filed a general denial by way of answer, but he asserted no affirmative defenses.

The case was set for trial on November 18, 2013. On November 15, Polny filed a motion in limine for permission to amend his answer to assert 31 affirmative defenses. The trial court heard the motion at the start of trial on November 18. The court inquired as to the basis for two of the defenses, but it became clear that Polny had no facts to back them up. The court denied the motion, stating, "[T]he more you add to your

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<sup>1</sup> We recite the facts in a manner most favorable to the judgment. (See *SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 552.)

answer, the more inclined I'm not going to allow it because these are issues that needed to be raised earlier so discovery could be conducted. [¶] . . . [¶] . . . I'm going to deny the motion for leave to file an amended answer. I see 31 affirmative defenses. They should have been done by way of motion before trial started. As far as I could see, the general issues are already going to be placed at issue with respect to the answer here."

The bench trial went forward, for about 20 minutes. A Citibank representative testified regarding the business records evidencing the loan, the partial repayment, and the balance owing. Polny, still representing himself, did not testify or put on any witnesses. The main thrust of his cross-examination was that the Citibank witness could not identify the Citibank account from which the loan funds had been transferred into his account.

The court awarded Citibank \$109,199 – the unpaid balance – and court costs of \$512, for a total judgment of \$109,711. Citibank waived interest, transfer fees, and attorney fees, to which it was entitled under the commercial credit agreement Polny had guaranteed.

## DISCUSSION

Polny's opening brief deals extensively with appellate review of an order sustaining a demurrer and whether leave to amend should be granted after such an order.<sup>2</sup> A demurrer does not figure in this case. The matter went to trial, and Citibank received a judgment in its favor. The only issue Polny has even arguably raised for review is whether the trial court abused its discretion when it refused to allow him to introduce 31 affirmative defenses into the case on the day of trial.<sup>3</sup>

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<sup>2</sup> Polny did not file a reply brief.

<sup>3</sup> Polny also argued the trial court abused its discretion by entering a judgment in Citibank's favor, without taking into account the "totality of the circumstances and the facts and evidence available to the court at the time of trial." The standard of review on that point would be substantial evidence (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881), not abuse of discretion, and Polny had every opportunity to present evidence at trial regarding the facts and circumstances of the loan. He presented none. He cites no legal authority for this argument, and we treat it as waived. (See *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 [issue unsupported by citation to authority waived].)

Whether to permit a party to amend an answer is a matter of the trial court's discretion. (*W&W El Camino Real, LLC v. Fowler* (2014) 226 Cal.App.4th 263, 270; *Betzer v. Olney* (1936) 14 Cal.App.2d 53, 60-61.) As one court has observed, "There is a platoon of authority to the effect that a long unexcused delay is sufficient to uphold a trial judge's decision to deny the opportunity to amend pleadings, particularly where the new amendment would interject a new issue which requires further discovery. [Citations.]" (*Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 692.) "Where inexcusable delay and probable prejudice to the opposing party is indicated, the trial court's exercise of discretion in denying a proposed amendment should not be disturbed." (*Estate of Murphy* (1978) 82 Cal.App.3d 304, 311.)

That is precisely what the trial court found in this case. Although Citibank filed its complaint in early January 2013, Polny waited until the day of trial, November 18, to request leave to amend. Citing the need for discovery on the new issues Polny wished to raise, the trial court denied the request. The court also pointed out that some of the "affirmative defenses" included in the new answer, such as whether Polny had paid part of his debt, were put at issue by the general denial.

Polny's motion to amend did not conform to California Rules of Court, rule 3.1324. Specifically, his declaration did not provide the information required by rule 3.1324(b), namely why the amendment was necessary and proper, when the facts giving rise to the amendment were discovered, and the reasons why the request to amend was not made earlier. This information would be particularly important to the trial court in view of the last-minute nature of the request. Polny's declaration gave none.

A number of the affirmative defenses, such as *res judicata*, collateral estoppel, "failure to joint," statute of frauds, and laches, were inapplicable to a debt collection action against one person based on a written contract. Moreover, it is Polny's burden to show on appeal how the court abused its discretion and compromised the "furtherance of justice" that is the cornerstone of Code of Civil Procedure section 473 by denying leave

to amend. (See *Vedder v. Superior Court* (1967) 254 Cal.App.2d 627, 629-630.) What evidence was he precluded from presenting that would have made a difference in the outcome of the case? What facts supported, for example, his affirmative defense of lack of jurisdiction or of in pari delicto? He has not made any such showing.

The court did not abuse its discretion in denying Polny's motion for leave to amend his answer.

### **DISPOSITION**

The judgment is affirmed. Respondent is to recover its costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.